

Appendix C - Endangered Species Act Review Procedures

You must meet at least one of the six criteria in Subpart 1.3.C.6 to be eligible for coverage under this permit. You must follow the procedures in this Appendix to assess the potential effects of storm water discharges and storm water discharge-related activities on listed species and their critical habitat. When evaluating these potential effects, operators must evaluate the entire project area.

For purposes of this Appendix, the term “project area” is inclusive of the term “Action Area.” Action area is defined in 50 CFR §402.02 as all areas to be affected directly or indirectly by the federal action and not merely the immediate area involved in the action. This includes areas beyond the footprint of the construction area that may be affected by storm water discharges and storm water discharge related activities. “Project area” is defined in Appendix A.

(Operators who are eligible and able to certify eligibility under Criterion B, C, D, or F of Subpart 1.3.C.6 because of a previously issued ESA section 10 permit, a previously completed ESA section 7 consultation, or because the operator’s activities were already addressed in another operator’s certification of eligibility may proceed directly to Step Four.)

Step One: Determine if Listed Threatened or Endangered Species are Present On or Near Your Project Area

You must determine, to the best of your knowledge, whether listed species are located on or near your project area. To make this determination, you should:

- Determine if listed species are in your county or township. The local offices of the U.S. Fish and Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and State or Tribal Heritage Centers often maintain lists of federally listed endangered or threatened species on their internet sites. Visit www.epa.gov/npdes/stormwater/cgp to find the appropriate site for your state or check with your local office. In most cases, these lists allow you to determine if there are listed species in your county or township.
- If there are listed species in your county or township, check to see if critical habitat has been designated and if that area overlaps or is near your project area.
- Contact your local FWS, NMFS, or State or Tribal Heritage Center to determine if the listed species could be found on or near your project area and if any critical habitat areas have been designated that overlap or are near your project area. Critical habitat areas maybe designated independently from the listed species for your county, so even if there are no listed species in your county or township, you must still contact one of the agencies mentioned above to determine if there are any critical habitat areas on or near your project area.

You can also find critical habitat designations and associated requirements at 50 CFR Parts 17 and 226.

<http://www.access.gpo.gov>.

- If there are no listed species in your county or township, no critical habitat areas on or near your project area, or if your local FWS, NMFS, or State or Tribal Heritage Center indicates that listed species are not a concern in your part of the county or township, you may check box A on the Notice of Intent Form.
- If there are listed species and if your local FWS, NMFS, or State or Tribal Heritage Center indicates that these species could exist on or near your project area, you will need to do one or more of the following:
 - Conduct visual inspections: This method may be particularly suitable for construction sites that are smaller in size or located in non-natural settings such as highly urbanized areas or industrial parks where there is little or no natural habitat, or for construction activities that discharge directly into municipal storm water collection systems.
 - Conduct a formal biological survey. In some cases, particularly for larger construction sites with extensive storm water discharges, biological surveys may be an appropriate way to assess whether species are located on or near the project area and whether there are likely adverse effects to such species. Biological surveys are frequently performed by environmental consulting firms. A biological survey may in some cases be useful in conjunction with Steps Two, Three, or Four of these instructions.
 - Conduct an environmental assessment under the National Environmental Policy Act (NEPA). Such reviews may indicate if listed species are in proximity to the project area. Coverage under the CGP does not trigger such a review because the CGP does not regulate new sources (that is, dischargers subject to New Source Performance Standards under section 306 of the Clean Water Act), and is thus statutorily

exempted from NEPA. See CWA section 511(c). However, some construction activities might require review under NEPA for other reasons such as federal funding or other federal involvement in the project.

If listed threatened or endangered species or critical habitat are present in the project area, you must look at impacts to species and/or habitat when following Steps Two through Four. Note that many but not all measures imposed to protect listed species under these steps will also protect critical habitat. Thus, meeting the eligibility requirements of this CGP may require measures to protect critical habitat that are separate from those to protect listed species.

Step Two: Determine if the Construction Activity's Storm Water Discharges or Storm Water Discharge-Related Activities Are Likely to Adversely Affect Listed Threatened or Endangered Species or Designated Critical Habitat

To receive CGP coverage, you must assess whether your storm water discharges or storm water discharge-related activities is likely to adversely affect listed threatened or endangered species or designated critical habitat that are present on or near your project area.

Potential adverse effects from storm water discharges and storm water discharge-related activities include:

- *Hydrological.* Storm water discharges may cause siltation, sedimentation or induce other changes in receiving waters such as temperature, salinity or pH. These effects will vary with the amount of storm water discharged and the volume and condition of the receiving water. Where a storm water discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely. Construction activity itself may also alter drainage patterns on a site where construction occurs that can impact listed species or critical habitat.
- *Habitat.* Excavation, site development, grading, and other surface disturbance activities from construction activities, including the installation or placement of storm water BMPs, may adversely affect listed species or their habitat. Storm water may drain or inundate listed species habitat.
- *Toxicity.* In some cases, pollutants in storm water may have toxic effects on listed species.

The scope of effects to consider will vary with each site. If you are having difficulty determining whether your project is likely to adversely affect listed species or critical habitat, or one of the Services has already raised concerns to you, you must contact the appropriate office of the FWS, NMFS or Natural Heritage Center for assistance. If adverse effects are not likely, then you may check box E on the NOI form and apply for coverage under the CGP. If the discharge may adversely effect listed species or critical habitat, you must follow Step Three.

Step Three: Determine if Measures Can Be Implemented to Avoid Adverse Effects

If you make a preliminary determination that adverse effects are likely to occur, you can still receive coverage under Criterion E of Subpart 1.3.C.6 of the CGP if appropriate measures are undertaken to avoid or eliminate the likelihood of adverse effects prior to applying for CGP coverage. These measures may involve relatively simple changes to construction activities such as re-routing a storm water discharge to bypass an area where species are located, relocating BMPs, or by changing the "footprint" of the construction activity. You should contact the FWS and/or NMFS to see what appropriate measures might be suitable to avoid or eliminate the likelihood of adverse impacts to listed species and/or critical habitat. (See 50 CFR §402.13(b)). This can entail the initiation of informal consultation with the FWS and/or NMFS (described in more detail in Step Four).

If you adopt measures to avoid or eliminate adverse affects, you must continue to abide by those measures for the duration of the construction project and coverage under the CGP. These measures must be described in the SWPPP and are enforceable CGP conditions and/or conditions for meeting the eligibility criteria in Subpart 1.3. If appropriate measures to avoid the likelihood of adverse effects are not available, you must follow Step Four.

Step Four: Determine if the Eligibility Requirements of Criterion B, C, D, or F of Subpart 1.3.C.6 Can Be Met

Where adverse effects are likely, you must contact the FWS and/or NMFS. You may still be eligible for CGP coverage if any likely adverse effects can be addressed through meeting Criterion B, C, D, or F of Subpart 1.3.C.6 of the CGP. These criteria are as follows:

1. *An ESA Section 7 Consultation Is Performed for Your Activity (See Criterion B or C of Subpart 1.3.C.6 of the CGP).*

Formal or informal ESA section 7 consultation is performed with the FWS and/or NMFS that addresses the effects of your storm water discharges and storm water discharge-related activities on federally-listed and threatened

species and designated critical habitat. FWS and/or NMFS may request that consultation take place if any actions are identified that may affect listed species or critical habitat. In order to be eligible for coverage under this permit, consultation must result in a “no jeopardy opinion” or a written concurrence by the Service(s) on a finding that your storm water discharge(s) and storm water discharge-related activities are not likely to adversely affect listed species or critical habitat (For more information on consultation, see 50 CFR §402). If you receive a “jeopardy opinion,” you may continue to work with the FWS and/or NMFS and your permitting authority to modify your project so that it will not jeopardize listed species or designated critical habitat.

Most consultations are accomplished through informal consultation. By the terms of this CGP, EPA has automatically designated operators as non-federal representatives for the purpose of conducting informal consultations. See Subpart 1.3.C.6 and 50 CFR §402.08 and §402.13. When conducting informal ESA section 7 consultation as a non-federal representative, you must follow the procedures found in 50 CFR Part 402 of the ESA regulations. You must notify FWS and/or NMFS of your intention and agreement to conduct consultation as a non-federal representative.

Consultation may occur in the context of another federal action at the construction site (e.g., where ESA section 7 consultation was performed for issuance of a wetlands dredge and fill permit for the project or where a NEPA review is performed for the project that incorporates a section 7 consultation). Any terms and conditions developed through consultations to protect listed species and critical habitat must be incorporated into the SWPPP. As noted above, operators may, if they wish, initiate consultation with the Services at Step Four.

Whether ESA section 7 consultation must be performed with either the FWS, NMFS or both Services depends on the listed species that may be affected by the operator’s activity. In general, NMFS has jurisdiction over marine, estuaries, and anadromous species. Operators should also be aware that while formal section 7 consultation provides protection from incidental takings liability, informal consultation does not.

2. An Incidental Taking Permit Under Section 10 of the ESA is Issued for the Operators Activity (See Criterion D of Subpart 1.3.C.6 of the CGP).

Your construction activities are authorized through the issuance of a permit under section 10 of the ESA and that authorization addresses the effects of your storm water discharge(s) and storm water discharge-related activities on federally-listed species and designated critical habitat. You must follow FWS and/or NMFS procedures when applying for an ESA Section 10 permit (see 50 CFR §17.22(b)(1) for FWS and §222.22 for NMFS). Application instructions for section 10 permits for FWS and NMFS can be obtained by accessing the FWS and NMFS websites (<http://www.fws.gov> and <http://www.nmfs.noaa.gov>) or by contacting the appropriate FWS and NMFS regional office.

3. You are Covered Under the Eligibility Certification of Another Operator for the Project Area (See Criterion F of Subpart 1.3.C.6 of the CGP).

Your storm water discharges and storm water discharge-related activities were already addressed in another operator’s certification of eligibility under Criteria A through E of Subpart 1.3.C.6 which also included your project area. For example, a general contractor or developer may have completed and filed an NOI for the entire project area with the necessary Endangered Species Act certifications (criteria A-E), subcontractors may then rely upon that certification and must comply with any conditions resulting from that process. By certifying eligibility under Criterion F of Subpart 1.3.C.6, you agree to comply with any measures or controls upon which the other operator’s certification under Criterion B, C, or D of Subpart 1.3.C.6 was based. Certification under Criterion F of Subpart 1.3.C.6 is discussed in more detail in the Fact Sheet that accompanies this permit.

You must comply with any terms and conditions imposed under the eligibility requirements of Criterion A through F to ensure that your storm water discharges and storm water discharge-related activities are protective of listed species and/or critical habitat. Such terms and conditions must be incorporated in the project’s SWPPP. If the eligibility requirements of Subpart 1.3.C.6 cannot be met, then you are not eligible for coverage under the CGP. In these instances, you may consider applying to EPA for an individual permit.